March 20, 2007

Ms. Liz Klumpp
Senior Energy Policy Analyst
Department of Community, Trade and Economic Development
906 Columbia Street SW, Fl. 5
P.O. Box 43173
Olympia, WA 98504-3173

Re: Scoping Comments of WRECA and NRU on CTED Rulemaking to Implement RCW 19.285, the Energy Independence Act

Dear Ms. Klumpp:

The following are the initial comments of the Washington Rural Electric Cooperative Association ("WRECA"), Northwest Requirements Utilities ("NRU") and Tacoma Power in response to CTED's March 2, 2007 Notice of Opportunity to File Written Comments on CTED's Rulemaking to Implement RCW 19.285, the Energy Independence Act (the "Act"). WRECA is a trade association whose members are Washington electric cooperatives. NRU is a trade association whose members include publicly and cooperatively owned electric utilities in Washington, Oregon and Idaho, which rely primarily on the Bonneville Power Administration for their power supply. Some members of both organizations are covered by the renewable portfolio standards in the Act. Tacoma Power is a municipal electric utility serving Tacoma, Washington.

We understand these comments to be initial comments concerning the scope of CTED's rulemaking process and, as noted in CTED's March 2 Notice, there will be "other opportunities to offer and or edit draft language between now and mid-September." WRECA and NRU appreciate this opportunity and we intend to remain engaged in your rulemaking process as it unfolds.

Before getting to our initial comments on substantive issues, we do have several preliminary comments and questions about how CTED intends to conduct this proceeding:

- **Is this Rulemaking Limited to Process, Timelines & Documentation or Does CTED Intend to Adopt Substantive Legislative Rules?** We understand that unlike the rulemaking authority granted to the Washington Utilities and Transportation Commission ("UTC"), the Act limits CTED's authority to issue rules to "...rules concerning only *process, timelines, and documentation* [applicable to] utilities that are not investor-owned utilities."

On its face, this provision appears to preclude CTED from adopting substantive interpretations of the Act, i.e. from engaging in "legislative rulemaking." It would be helpful to know the extent to

which CTED interprets its authority under the Act as allowing or precluding the agency from engaging in legislative rulemaking, i.e., rulemaking involving substantive interpretations of the law.

If the agency lacks authority to adopt substantive interpretations of the law concerning provisions of the Act that are ambiguous or disputed by the parties, how will the agency determine what the law is for purposes of devising rules governing "process, timelines and documentation" to comply with the law?

On the other hand, if CTED views its rulemaking authority as including the authority to engage in legislative rulemaking involving interpretation of substantive provisions of the Act, it should so state and invite comments from interested parties on whether that is correct.

- **Coordination with WUTC Proceeding.** We note that the UTC's January 24, 2007 CR 101 (Preproposal Statement of Inquiry) on its rulemaking docket for the Energy Independence Act, UTC Docket UE-061895, expresses an awareness of this parallel CTED proceeding. The UTC Notice states, "[T]he UTC welcomes CTED's participation in this inquiry as an interested person. If practical and convenient, the UTC may conduct joint workshops with CTED on certain subjects pertinent to this inquiry."

It would be helpful to know whether CTED intends to participate actively in the UTC proceeding as an "interested person," and/or how CTED will otherwise coordinate this rulemaking with the UTC proceeding. For example, does CTED intend to conduct joint workshops or other joint activities? Does CTED intend to offer substantive interpretations of the Act in the UTC proceeding? How will CTED coordinate with the UTC concerning resolution of issues involving process, timelines and documentation" and/or substantive issues that are raised in both rulemaking proceedings? Does CTED intend to give deference to or assume that UTC interpretations of substantive provisions of the Act are correct?

Beyond the above preliminary questions and comments, NRU/WRECA submit the following comments in response to the Notice. We have attempted to follow the format suggested by CTED in the Notice.

Issue 1: Alternative Compliance By Purchasing Only Eligible Resources for Load Growth.

1. Statutory Citation. RCW 19.285.040(2)(d)(i)-(iii)

> (d) A qualifying utility shall be considered in compliance with an annual target in (a) of this subsection if: (i) The utility's weather-adjusted load for the previous three years on average did not increase over that time period; (ii) after the effective date of this Section, the utility did not commence or renew ownership or incremental purchases of electricity from resources other than renewable resources other than on a daily spot price basis and the electricity is not offset by equivalent renewable energy credits; and (iii) the utility invested at least one percent of its total annual retail revenue requirement that year on eligible renewable resources, renewable energy credits, or a combination of both.

2. Issue Statement.

This provision is not a model of clear legislative drafting. The best reading of this provision is that a qualifying utility that either (i) has had no load growth in the preceding 3 year period, or (ii) meets all of its load growth after the effective date (January 1, 2012) with eligible resources, and (iii) spends 1% or more of its annual revenue requirement on eligible resources, meets the alternative compliance requirements under .040(2)(d)(i)-(iii). Accordingly, CTED should identify what documentation must be provided by a qualifying utility to the qualifying utility's Auditor to support a finding of compliance?

3. Concept of Proposed Rule Language.

CTED should adopt rules that describe the process, timelines, and documentation that is required for a utility to show alternative compliance with its annual RPS targets under .040 (2)(a) by: (1) either the absence of load growth for the 3 years prior to the effective date; or (2) that the utility has met all of its load growth after the effective date solely by making incremental purchases of eligible resources; and (3) that the utility expended at least 1% of its annual revenue requirement on eligible resources.

4. Explanation of the Proposed Rule Language Concept.

RCW 19.285.040(2)(d(i)-(iii) sets forth an alternative method of compliance with the 3, 9 and 15 percent renewable resource targets set out in section .040(2)(a). There are three criteria that apply to eligibility for alternative compliance. They are: (i) did the utility have load growth; (ii) did the utility acquire resources other than eligible resources after the effective date of this Section; and (iii) did the utility expend 1% or more of its revenue requirement on eligible resources. There is an "AND" after (d)(ii) so it is fairly clear that (d)(iii) (expenditure of 1% of revenue on eligible resources) is always a required criteria. However, because there is no AND or OR after sub (ii), it is not clear whether the first two criteria should be read as conjunctive or disjunctive. In other words, is it required that both (i) and (ii) be met, or does compliance require only that one or the other be met?

As noted above, the best and most logical reading of this provision is that a qualifying utility satisfies the criteria for alternative compliance by EITHER (i) documenting that it has had no load growth in the 3 year period preceding the compliance date, OR (ii) documenting that it has met all of its load growth since the compliance date with eligible resources, AND (iii) that it has spent 1% or more of its annual revenue requirement on eligible resources.

There are only two scenarios; either a utility has load growth or it does not. The first scenario is that a utility meets (d)(i) because it has no load growth. In that case, by definition the utility has no "incremental" load and cannot have commenced or renewed "incremental" power purchases of ANY resources, which, of course, includes ineligible resources. Since the utility has made NO incremental purchases, compliance with (d)(ii) occurs automatically and there is no need or purpose to a further requirement that the utility document that it did not "commence" or "renew" "incremental purchases" of ineligible resources . I.e., if a utility documents that it had no load growth, it is ALWAYS true that the utility has not renewed or commenced "incremental purchases" of ineligible resources and there is no need or purpose for (d)(ii).

The second scenario is that a utility does have load growth. In that case, if (d)(i) and (d)(ii) are interpreted to be conjunctive, then even if the utility makes only "incremental purchases" of eligible renewable resources, it has already failed to meet the requirements of (d)(i), and it is impossible to qualify for alternative compliance. Under that interpretation, (d)(ii) serves no purpose and becomes meaningless. Interpretations give meaning to every provision in a statute are favored over interpretations that render a particular provision meaningless.

Only if (i) (no load growth) and (ii) (no incremental purchases of ineligible resources) are interpreted to be disjunctive (i.e. either/or) does the provision make sense. Only then is there a purpose for both prongs of the test. Interpreted in the disjunctive, if the utility has no load growth OR it makes no "incremental purchases" of ineligible resources AND it spends 1% of its revenue requirement on eligible resources, then the utility is deemed in compliance.

The "effective date of this Section" is January 1, 2012, the date the RPS standards mandated by this Section go into effect. Therefore, the "incremental purchases" referred to in .040(2)(d)(ii) are purchases to meet load growth occurring after the January 1, 2012 "effective date[1]."

Issue 2: Eligibility of "Out-of-Region" Renewable Resources.

1. Statutory Citation

(10) "Eligible renewable resource" means:

(a) Electricity from a generation facility powered by a renewable resource other than fresh water that commences operation after March 31, 1999, where: (i) The facility is located in the Pacific Northwest; or (ii) the electricity from the facility is delivered into Washington state on a real-time basis without shaping, storage, or integration services; or ...

2. Issue Statement.

CTED should clarify what documentation must be provided to the qualifying utility's Auditor to demonstrate: (i) "delivery" of eligible resources into Washington State, (ii) on a "real-time" basis, (iii) without "shaping, storage, or integration services."

3. Concept of Proposed Rule Language

Subparagraph (ii) of section 10(a) is somewhat ambiguous. However, we start from the premise that any interpretation that would impose regulatory standards that do not apply to in-region resources and that would effectively prohibit the use of cost-effective out-of-region renewable resources are

[1] The actual text of I-937 is as shown in the Statutory Citation paragraph above. However, when the Code Reviser codified I-937, "December 7, 2006" was inserted in place of "the effective date of this Section." While the overall effective date of the Act was December 7, 2006 (30 days after the election), the reference in the Initiative text to "the effective date of this Section" indicates that this Section has a separate and different effective date, i.e. the date the RPS standards go into effect.

contrary to the purposes of the Act and must be rejected. Moreover, such an interpretation would also unlawfully discriminate against out-of-region renewable resources and conversely provide an unlawful competitive advantage to in-region resources.

CTED needs to adopt rules that enable qualifying utilities to document: (1) "delivery" of an out-of region renewable into Washington State, (2) compliance with the requirement for delivery in "real time," and (3) the acquisition of ancillary services necessary to make eligible resources usable.

4. Explanation of the Proposed Rule Language Concept

Every resource that is connected to any power grid requires "integration services." It would be impossible to connect any resource, whether renewable or not, to the Northwest power grid if it was illegal for *anyone* to provide "integration services." Likewise, given that renewable resources such as wind, are intermittent, it would be virtually impossible for any load serving utility to make use of wind without ancillary services, such as storage and shaping. This would be especially so for non-generating utilities that have no ability to provide shaping or storage themselves.

Interpreting the Act to effectively preclude the use of integration, storage and shaping for out-of-region wind would amount to an outright prohibition on the use of such resources to meet RPS targets. Such an interpretation is patently unreasonable and contrary to the broad purposes of the Act. It would lead to the absurd result of effectively precluding the use of cost-effective out-of-region wind and other renewable resources to meet RPS targets. However, it is not necessary to interpret the phrase "delivered into Washington on a real time basis, without shaping, storage, or integration services," to cause that result.

First, there is no definition of what constitutes "delivery" into Washington or what it means to deliver eligible resources in "real time." Second, the provision does not specify whether the prohibition on delivery with any "integration, shaping or storage" services applies to the seller or the buyer or both. Thus, the phrase may be interpreted so as to best carry out the purposes of the Act without discriminating against out-of-region resources.

To rescue these provisions from causing an absurd result, CTED should adopt a rule clarifying that a qualifying utility may document compliance with the requirements of RCW 19.285.030 (10)(a)(ii) by showing that purchases from an out-of-region renewable resource that meet the following criteria, are qualifying purchases of eligible resources:

- The resource is or will be connected to the Pacific Northwest power grid; and
- The qualifying utility owns the resource or an output share of the resource, or has entered into a power purchase contract to purchase output from the resource; and
- The qualifying utility has made arrangements for integration, storage, shaping and any other ancillary services that may be required to make power from the resources usable to serve its load; and

- The qualifying utility demonstrates that arrangements are in place to deliver the output share that is owned or being purchased to an in-state market hub or to a substation in Washington.

In other words, an out-of-region renewable resource satisfies the requirements of section .030(10)(a)(ii) upon a showing that: (i) the resource is connected to the Northwest power grid, (ii) the qualifying utility either owns the resource or a share of the resource, or has the right to purchase output from the resource, (iii) the qualifying utility has made whatever transmission and other arrangements are necessary for actual delivery of the power to a market hub or a substation in Washington, and (iv) such arrangements by the buyer may include storage, shaping and other necessary ancillary services.

Issue 3: Eligibility of Output from Hydro Efficiency Improvements to Federal Dams and Dams owned by Washington Utilities with Fewer than 25,000 Customers or Out-of-State Utilities.

1. Statutory Citation

(10) "Eligible renewable resource" means:

(b) Incremental electricity produced as a result of efficiency improvements completed after March 31, 1999, to hydroelectric generation projects owned by a qualifying utility and located in the Pacific Northwest or to hydroelectric generation in irrigation pipes and canals located in the Pacific Northwest, where the additional generation in either case does not result in new water diversions or impoundments.

2. Issue Statement.

How should qualifying utilities document purchases of renewable resources from hydro efficiency improvements at FCRPS facilities or hydro efficiency purchases from non-qualifying utilities in order to receive the appropriate credit for eligible resource purchases from hydro efficiency improvements that are either embedded in BPA purchases or in purchases from non-qualifying utilities.

3. Concept of Proposed Rule Language

Each qualifying utility can count all qualifying renewable resource purchases that are embedded in BPA's wholesale products (e.g., tier I or tier II, slice, block, etc.). For purposes of this calculation, a pro-rata share of the actual MWhs from hydro efficiency improvements to FCRPS dams shall be included in the calculation of renewable resources embedded in BPA wholesale products. Likewise, a qualifying utility may count power purchased from a non-qualifying utility that comes from hydro efficiency improvements at any PNW dam.

4. Explanation of the Proposed Rule Language Concept

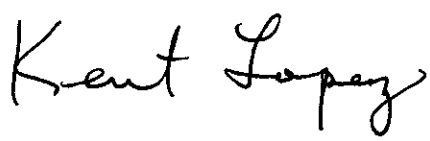
The Act explicitly includes hydro efficiency improvements at PNW dams owned by "qualifying utilities" in the definition of "eligible resources." The Act is silent as to whether exactly the same hydro

efficiency improvements made to FCRPS dams or to PNW dams owned by utilities that are not "qualifying utilities" are intended to be eligible resources. Exclusion of FCRPS hydro efficiency resources and hydro efficiency resources owned by non-qualifying utilities and out-of-state utilities due to silence would be irrational and discriminatory against the federal government, against Washington utilities that own dams and make hydro efficiency improvements but are not "qualifying utilities," and against out-of-state utilities that own exactly the same resource. CTED should clarify that qualifying utilities may document equivalent hydro efficiency resources from the FCRPS and from resources owned by non-qualifying and out-of-state utilities as eligible resources for purposes of demonstrating compliance with the RPS targets. In other words, if equivalent hydro efficiency improvements are made at a dam owned by a qualifying utility, a federal dam or at a dam owned by a non-qualifying utility, any qualifying utility would be entitled to document purchases from the hydro efficiency improvement as an "eligible resource."

Section RCW 19.285.030(10)(b) is ambiguous due to its silence as to whether federal or non-qualifying utility hydro efficiency improvements qualify. The silence of the Act on this point should not be interpreted as a license to discriminate against hydro efficiency improvements at dams in the PNW based on whether the owner happens to be a "qualifying utility." This is so for the following reasons: (1) the provision does not specifically exclude FCRPS hydro and is therefore ambiguous, (2) including purchases of hydro efficiency power from the FCRPS or dams owned by non-qualifying is consistent with the treatment of the same resource if owned by a qualifying utility; and (3) it would be illogical to treat the same resource differently depending on the ownership, and it would impose an undue burden on interstate commerce for the State of Washington to treat identical resources differently based solely on whether the owner happens to be a Washington utility with 25,000 or more customers versus the federal government, a Washington utility with less than 25,000 customers, or an out of state utility.

Sincerely,

WASHINGTON RURAL ELECTRIC COOPERATIVE ASSOCIATION



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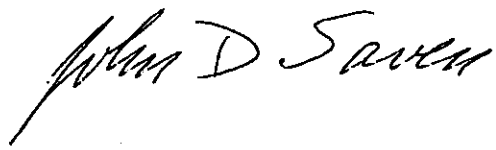
NORTHWEST REQUIREMENTS UTILITIES



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